No. 82-1307

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LEWIS T. GRAHAM, JR.

APPELLANT,

v.

STATE OF LOUISIANA

APPELLEE.

On Appeal From The Supreme Court Of Louisiana

MOTION TO DISMISS THE APPEAL LODGED BY APPELLANT FILED ON BEHALF OF THE STATE OF LOUISIANA, APPELLEE

PAUL J. CARMOUCHE
District Attorney
BARBARA B. RUTLEDGE
Assistant Attorney General
JAMES C. MCMICHAEL, JR.
PAUL J. CARMOUCHE
Trial Counsel
DALE G. COX, JR.
Counsel on Appeal
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101
(318) 226-6826

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

UNITED STATES SUPREME COURT JURISPRUDENCE:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1307

LEWIS T. GRAHAM, JR.

APPELLANT,

v.

STATE OF LOUISIANA

APPELLEE.

On Appeal From The Supreme Court Of Louisiana

MOTION TO DISMISS THE APPEAL LODGED BY APPELLANT FILED ON BEHALF OF THE STATE OF LOUISIANA, APPELLEE

STATEMENT OF THE CASE

On March 31, 1980, Kathleen Graham was beaten to death while she slept in the bedroom of her home at 2033 South Kirkwood in Shreveport, Caddo Parish, Louisiana. Expert testimony from two coroners who performed her autopsy showed that a sledgehammer found near her bed was probably the instrument that caused her death. Her blood type was discovered on the sledgehammer.

When Kathleen Graham went to sleep that night there were only four (4) other people in her home. Her husband, Lewis T. Graham, Jr. shared the master bedroom with her; her sons David, age 16, and Eric age 12, shared a

bedroom and her daughter Katie, age 7, had a separate bedroom.

At 5:09 a.m. March 31, 1980, Lewis Graham called the Shreveport Police advising them that intruders had broken into his home and severely injured his wife. When police arrived they found Mrs. Graham lying on her back on the left side of the bed. Her face was covered with blood, the result of a savage beating. Blood was everywhere in the master bedroom. Police found a sledgehammer and a knife on the floor of the bedroom. Both of these items belonged to Lewis Graham, Jr. They also saw a great deal of blood on the right side of the bed. Graham had blood on the front and back of his t-shirt and the front of his undershorts. These were the clothes in which he had slept that night. The shower, tub and lavatory in the master bedroom were wet and blood was found in the lavatory.

Police canvassed the inside and outside of the Graham home and in their opinion no forced entry of that home had been made. They found the garage door partially open and in the driveway police found a can of coins and flashlight. Both items belonged to Dr. Graham's family. Not taken by the intruders was Mrs. Graham's diamond ring which was located in a box in the dresser drawer of the master bedroom. Inside the den of the home police saw liquor bottles strewn thoughout the floor. They also saw a knife sheath which housed the knife they had earlier found in the master bedroom. Everything the police found belonged to the Graham family.

The autopsies of Kathleen Graham revealed that she died because of blunt head trauma caused by an instrument consistent with the sledgehammer found in her bedroom. Dr. George McCormick, a Forensic Pathologist, testified that Mrs. Graham had sustained at least four

blows to the top of her head with a sledgehammer while she was lying on her left side on the right side of the bed. These blows were struck in rapid succession and rendered her unconscious. She lived for some fifteen to thirty minutes after the first blows were struck. Dr. McCormick testified that after the first set of blows she moved or was moved onto her back on the left side of the bed where she received what he considered to be the final blow, a massive blow to her forehead also delivered with the sledgehammer. Mr. Herbert McDonnell, the State's expert in blood splatter matters, testified there was at least a five minute interval between the first set of blows and the final blow to Kathleen Graham.

Scientific tests revealed that the spatters of blood on the front of Graham's t-shirt and the drips of blood on the back and front of his right shoulder were Type A blood. Spatters of blood on his undershorts were Type A blood. The blood on the sledgehammer was Type A blood. Kathleen Graham was blood Type A; Lewis Graham was blood Type O.

Lewis Graham suffered a small abrasion on his forehead which required no medical treatment; a superficial cut across the entire palm of his left hand which required no medical treatment; and an incision type wound on the flank underneath his left arm which required one stitch to close. The blood stain under the left arm which corresponded to the location of the incision type wound on Graham's body was determined to be Type O. Police technicians found Mr. Graham's fingerprint on the knife.

The Graham children were not harmed at all. Indeed they were never awakened until Graham telephoned the police and awaited the arrival of a neighbor from across the street. Graham and the neighbor woke the children together.

Lewis Graham gave several statements to the police. Essentially he related that his wife woke him between 2:00 and 3:00 a.m. on the morning of the crime claiming that she heard noises. After he checked the house and found all of the doors closed he returned to the bedroom and went back to sleep. Sometime thereafter he remembered the bed lurching and he heard a scream. He felt he was pulled from the bed by more than one person who manhandled him. He felt a sharp pain under his left arm. He remained on the left side of the bed for a few seconds before he was thrown across the room where he fell onto his stomach and lay unconscious. He was unable to describe anything about his assailants. When he awoke he saw the terrible scene described above. Thereafter he telephoned the police.

The State's expert witness in the field of blood splatter interpretation was Herbert McDonnell. He gave the opinion that Kathleen Graham was the victim of two separate beatings, the first while she lay on the right side of the bed lying on her stomach. The second came after she moved or was moved to the left side of the bed. He concluded that the blood stains on the front and back of the right shoulder of Mr. Graham's t-shirt were consistent with the type of cast-off spatter normally found on the shirt of a person who had swung overhead an object similar to the sledgehammer in this case. He concluded that the size and concentration of the blood stains on the front of Mr. Graham's t-shirt indicated that Graham was within two to four feet of the victim at the time she was beaten. He concluded that blood found on the defendant's undershorts was coagulated blood. He opined that human blood coagulates in three to five minutes and thereby concluded that there was a three to five minute interval between the separate beatings. From the size and concentration of the blood splatters, on the front of the

defendant's undershorts, Mr. McDonnell concluded that the defendant was within two to four feet of the victim when the last beating was administered. He also identified what he believed to be wipe marks down the left side of the defendant's t-shirt. He opined that these marks were consistent with the knife having been wiped on the t-shirt several times.

The State of Louisiana tried Lewis Graham for second degree murder.[1] The trial lasted three weeks. The jury was sequestered. A review of the entire record will reveal that the trial of this case was legally flawless. At the conclusion of the evidence the trial judge instructed the jury regarding the rule of direct and circumstantial evidence.[2] The jurors deliberated overnight and the next morning returned a verdict: guilty as charged by a vote of 10-2.

After the verdict was returned it was discovered that after deliberation had concluded for the night one of the jurors had performed an experiment in the hotel room while some of the other jurors watched. This juror pricked his finger and a watch was used to gauge the time it

---

[1] "Second degree murder is the killing of a human being: (1) when the offender has a specific intent to kill or to inflict great bodily harm; or (2) when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation or suspension of sentence."

[2] The pertinent part of the jury instruction is attached as Appendix "A".

took his blood to coagulate. The next morning the jurors reached a 10-2 verdict.

Pursuant to the defendant's motion for new trial an evidentiary hearing was held at which the defendant was allowed to produce evidence that the jury was deadlocked on the first night of deliberation; that they retired to their hotel room; that there the blood experiment was conducted. The defendant was allowed to develop the names of the persons who were present and the name of the juror who conducted the experiment. A juror also testified that after the blood experiment was conducted the jurors returned for deliberation and one of the jurors changed his vote thereby giving the jury the necessary ten votes for a conviction. Defendant was not allowed to inquire which juror changed votes. A juror did testify when the verdict was reached in relationship to the time of the experiment. [Transcript 3042-3055] The trial judge denied the motion for new trial along with the defendant's motion in arrest of judgment. The Louisiana Supreme Court affirmed the conviction and sentence in its opinion reported at 422 So.2d 123.

Appellant lodged his jurisdictional statement with this Court on three grounds. This Court has asked that appellee respond with its position. The State moves this Court to dismiss the appeal which appellant has lodged and to affirm the judgment of the Louisiana Supreme Court.

THE JURY PRIVILEGE STATUTE

The State of Louisiana submits that question number one concerns the jury privilege statute *La. R. S. 15:470.*[3]

The State submits that question number one should be dismissed because it does not present a substantial feder-

[3] See Appendix "B"

al question. Appellant contends that *R. S. 15:470* violates his Sixth and Fourteenth Amendment constitutional rights to confrontation, fair trial and due process because it prevents him from inquiring which juror changed votes in this case and exactly when this change took place. Appellant does not contend that his constitutional rights were abridged because the statute prevented his inquiry into the mental processes of the jurors.

The policy behind *R. S. 15:470* protects jury verdicts by insulating them and the jurors who render them from constant second guessing. It assures finality. The Court has approved this policy. See *McDonald* v. *Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915) and *Mattox* v. *United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892) The Louisiana Supreme Court has approved the policy in *State* v. *Wisham*, 384 So.2d 385 (1980). The Fifth Circuit United States Court of Appeals has approved this policy in *Llewellyn* v. *Stynchcombe*, 609 F.2d 194 (1980).

The State is not cited to any authority that allows an accused to probe the mental processes of the jury which convicted him. [See appellant's Jurisdictional Statement, pages 16-17] Thus the narrow issue raised by question one is the scope of the inquiry. The Louisiana Supreme Court has interpreted this statute in such a way that it must yield to an accused's constitutional rights. Thus the Louisiana Supreme Court in its opinion in *Graham*[4] approved *Durr* v. *Cook*, 589 F.2d 891 (1979) which mandated an inquiry of the jury regarding misconduct by the jurors during deliberation. The Louisiana Supreme Court adapted the Fifth Circuit's rule regarding prejudice in these kinds of cases i.e. was there a reasonable possibility

---

[4] 422 So.2d 123 at pp. 131, 132.

of prejudice as the result of the juror's misconduct. The Louisiana Supreme Court reasoned that if the accused does not have to show actual prejudice the scope of *R. S. 15:470* can be constitutionally limited to the inquiry approved by the Fifth Circuit in *Durr* v. *Cook*. Acting on this premise they detailed the weight of the evidence against the accused and determined that there was no reasonable possibility that prejudice resulted from the blood experiment in this case.[5] Thus the only real inquiry that could make any difference to the defendant is a probing of the jurors' mental process i.e. who changed votes and why? Since appellant does not contend that he has this right nor that the Constitution affords him this right there is no substantial federal question remaining. The inquiry who changed votes and when simply adds nothing material to the analysis which the Louisiana Supreme Court has already made of the total evidence against the accused.

The cases upon which appellant relies for his proposition are distinguishable. In *Smith* v. *Phillips*, ___ U.S. ___, 71 L.Ed.2d 78, 100 S.Ct. 940, (1982), the prosecution had withheld knowledge of a trial juror's application for employment with their office during the time the juror served on the defendant's trial. The disclosure was made post-trial and the State Judge held an evidentiary hearing. This Court on Writ of Habeas Corpus from the Federal Circuit upheld the trial jury verdict saying that due process requires that an accused be permitted to show actual bias in a juror impartiality situation.

The *Smith* case did not deal with the interpretation of a state statute defining the scope of the hearing to determine actual bias. Indeed the New York State Court con-

---

[5] These facts are reproduced from their opinion as Appendix "C".

ducted an evidentiary hearing in which the juror was allowed to adduce evidence about the misconduct. The Court said that the evidence adduced was constitutionally sufficient. Hence, even under the *Smith* doctrine the juror could not be asked if the job application affected his vote. The State submits that *Smith* does not stand for the proposition that in a juror experiment case due process requires greater inquiry than that allowed by the Louisiana Supreme Court in our case.

In *Dennis* v. *United States*, 339 U.S. 162, 94 L.Ed. 734, 70 S.Ct. 519 (1950), the accused claimed his due process rights were violated by a trial jury composed of government employees who had all signed a loyalty oath and who had to pass on the accused's (a communist) behavior. This Court said in dicta that there could be no implied bias that prevented a government employee from serving on a jury. The accused is entitled (was required) to show actual bias. This case did not deal with the accused's attempt to challenge a juror's verdict but rather defendant appealed an erroneous denial of his challenge for cause during voir dire. Moreover this case did not interpret a statute of the District of Columbia which defined the scope of inquiry into jury verdicts.

In *Remmer* v. *U.S.*, 347 U.S. 227, 98 L.Ed. 654, 74 S.Ct. 450 (1954) the Court ordered a remand for an evidentiary hearing to determine the effect that an outside contact with the juror during the trial had on the case. *Remmer* did not define the scope of the hearing that was to determine harmfulness nor did it interpret a statute that would seek to define the scope of that hearing. Hence these three cases really have no persuasive effect on the Court in this case.

The State of Louisiana submits that because of the evidence against the accused there was no reasonable

possibility of prejudice raised by the juror's experiment. Because the accused has been given the opportunity to make every showing necessary to a reasonable possibility of prejudice and because the accused does not otherwise contest the constitutionality of *R. S. 15:470* there is no substantial federal question presented by this issue. Hence the appeal on question number one should be dismissed.

ASSIGNMENT OF ERROR NUMBER II

Appellant contends that the Louisiana statutory scheme which allows a non-unanimous verdict in a second degree murder prosecution is unconstitutional. He contends this is so because second degree murder provides a mandatory life sentence at hard labor without benefit of parole, probation or suspension of sentence and that the Constitution (the Sixth, Eighth and Fourteenth Amendments) should preclude a man automatically going to jail for the rest of his life upon the vote of less than all the jurors that heard his case.

Appellant also challenges a non-unanimous verdict because it violates his Sixth Amendment right to trial by jury as applied to the States through the Fourteenth Amendment and because it violates his Fourteenth Amendment right to due process and equal protection of the laws. He challenges the mandatory sentence provided by *La. R. S. 14:30.1* because it violates the Eighth Amendment prohibition against cruel and unusual punishment as applied to the States through the Fourteenth Amendment.

The State of Louisiana submits the challenges are without merit individually and in combination.

THE NON-UNANIMOUS VERDICT

Article 1 Section 17 of the Louisiana Constitution of 1974[6]*; La. C. Cr. P. Article 782*[7] are the authorities for Louisiana's scheme allowing less than unanimous verdicts in non-capital cases where the punishment is necessarily at hard labor. The Court has held in *Johnson* v. *Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed. 2nd 152 (1972) that a non-unanimous verdict (9-3) did not violate the accused's constitutional rights to due process or equal protection of the law. The crime involved in *Johnson* was armed robbery which is punishable by a sentence of not less than five (5) nor more than ninety-nine (99) years at hard labor without benefit of parole, probation or suspension of sentence.[7a]

Furthermore in *Apodaca* v. *Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed. 2nd 184 (1972) the Court held that a 10-2 verdict did not violate the accused's Sixth Amendment right to trial by jury as applied to the States through the Fourteenth Amendment.

Appellant does not cite any authority that holds otherwise in cases composed of twelve (12) person juries. *Burch* v. *Louisiana*, 441 U.S. 130, 60 L.Ed. 2nd 96, 99 S.Ct. 1623 (1979) held unconstitutional Louisiana's statutory scheme that allowed less than unanimous verdicts in six (6) person jury cases. The Court's reasons for reversal in *Burch* were largely the same that it used in holding unconstitutional five person juries in *Ballew* v. *Georgia*,[8] 435 U.S. 223, 55 L.Ed. 2nd 234, 98 S.Ct. 1029

---

[6] See text as Appendix "D"

[7] See text Appendix "E"

[7a] See text Appendix "F"

[8] These reasons are cited at pp. 241-246 of the opinion.

(1978). In *Ballew* the Court referred to studies casting doubt on the validity of verdicts rendered by five (5) member juries. The Court's reasons for reversal in *Ballew* had nothing to do with the rule of non-unanimity but rather with the total size of the jury. Hence the reasoning of *Burch* is not relevant to the requirement of unanimity in twelve (12) person juries. Neither *Burch* nor *Ballew* even hint that the same concerns are present when the trier of fact is composed of twelve (12) persons. The State submits that the non-unanimous verdict in twelve (12) person juries is still constitutional after *Burch*.

THE MANDATORY SENTENCE

Appellant contends that the penalty for second degree murder violates his Eighth Amendment right against cruel and unusual punishment as applied to the States in the Fourteenth Amendment. Appellant makes this argument because the statute removes discretion from the sentencing judge and because he has no right to parole, probation or suspension of sentence. Appellant contends that for him this sentence is the legal equivalent of a death sentence. In those cases individualized, articulated reasons for sentence are required. See *Furman* v. *Georgia*, 408 U.S. 238, 33 L. Ed. 2nd 346, 92 S.Ct. 2726 (1972).

The State submits that the mandatory penalty for second degree murder is constitutional. The Court has held that non-capital sentences are left to the sound discretion of State legislatures. *Hutto* v. *Davis*, ____ U.S. ____, 70 L.Ed.2d. 556, 102 S.Ct. 703 (1982). The Court has rejected a proportionality analysis in interpreting a Texas recidivist statute that resulted in the defendant's life sentence after his third conviction for theft. See *Rummell* v. *Estelle*, 445 U.S. 263, 63 L.Ed. 2nd 382, 100 S.Ct. 1133 (1980). The Court has also said that individualization of sentences is not required in non-capital cases though

required in capital cases; *Lockett* v. *Ohio*, 438 U.S. 586, 57 L.Ed. 2nd 973, 98 S.Ct. 2954 and has implied the same in *Woodson* v. *North Carolina*, 428 U.S. 280, 49 L.Ed. 2nd 944, 96 S.Ct. 2978 at 2991 (1976). The Court has concluded that it is constitutionally impossible to compare sentencing schemes in non-capital cases because of the variables involved. The unique finality of the death penalty compels a different constitutional result.

In *Schick* v. *Reed*, 419 U.S. 256, 42 L.Ed. 2nd 430, 95 S.Ct. 379 (1974) the Court held that a presidential commutation of a death sentence to life imprisonment without benefit of parole did not offend the Constitution. See also the Ninth Circuit's approval of a mandatory life sentence without benefit of parole against an Eighth Amendment challenge in *U.S.* v. *Valenzuela*, 646 F.2d 352 (1980). Other jurisdictions have approved mandatory life sentences which do not allow the benefit of parole. See *Annotation at 33 ALR 3rd 335 Section 7A.*

The Louisiana Supreme Court has recently sustained the penalty for second degree murder against a challenge that it was cruel and unusual where the verdict was non-unanimous. See *State* v. *Parker*, 416 So.2d 545 (1982) at page 552; it has also upheld a mandatory life sentence without benefit of parole, probation or suspension of sentence in an aggravated rape case, specifically rejecting the proportionality test advanced in *Hart* v. *Coiner*, 483 F.2d 136 (1973) 4th Cir. See *State* v. *Talbert*, 416 So.2d 97 (1982) at page 102.

Louisiana tempers its mandatory sentence scheme with provisions allowing executive grace. *La. R. S. 15:572 A*[9] and *La. R.S. 15:474.4B*[10] allowed appellant ear-

---

[9] *La. R. S. 15:572.A* — "The governor may grant reprieves to persons convicted of offenses against the state and, upon recommen-

ly release through pardon or parole. This statutory scheme proves the wisdom of allowing local legislatures to define punishment for non-capital felonies. By these provisions Louisiana has provided an executive check and balance on the judicial system. This is one further reason that the mandatory sentence scheme is not unconstitutional.

The State of Louisiana submits that its mandatory life sentence for second degree murder does not offend the Eighth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment.

THE COMBINED EFFECT OF THE NON-UNANIMOUS VERDICT WITH THE MANDATORY SENTENCE

Appellant further contends that the effect of a non-unanimous verdict producing a mandatory life sentence without benefit of parole is unconstitutional. The State submits that the two concepts cannot be reasonably combined because the rationale the Court has used in sustain-

---

dation of the Board of Pardons as hereinafter provided for by this Part, may commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeitures imposed for such offenses."

[10] *La. R. S. 15:574.4B* — "No person shall be eligible for parole consideration who has been convicted of armed robbery and denied parole eligibility under the provisions of *R. S. 14:64*, or who has been convicted of violation of the Uniform Narcotic Drug Law and denied parole eligibility under the provisions of *R. S. 40:981*. No Prisoner serving a life sentence shall be eligible for parole consideration until his life sentence has been commuted to a fixed term of years. No prisoner may be paroled while there is pending against him any indictment or information for any crime suspected of having been committed by him while a prisoner."

ing them individually proves they have nothing to do with each other.

The rationale that supports a non-unanimous verdict concerns the size of the community's cross section that will adjudicate guilt or innocence, not the sentence that will result in the event of a conviction. The rationale that allows mandatory sentencing in non-capital felonies comes from the fact that there is no constitutional way to compare variables in non-capital sentencing, thus the matter is left to the discretion of State legislatures. It has nothing to do with the size of the body which acted as the trier of fact.

Appellant would have the Constitution mandate lower courts to consider these two together. Thus, Courts could be called on in given cases to weigh the possible penalty involved, the age of the accused, and the life expectancy of the accused in order to determine the number of jurors required to convict the accused in that case. Thus, a sixty (60) year old person convicted of aggravated burglary[11] would face the practical equivalent of a life sentence even though his sentence is discretionary with the judge. Does the Constitution compel his jury to be unanimous in order to convict? The State submits that it does not. Indeed, Frank Johnson[12] faced a potential life sentence and this

---

[11] *La. R. S. 14:60* — "Aggravated burglary is the unauthorized entering of any inhabited dwelling, or of any structure, water craft, or movable where a person is present, with the intent to commit a felony or any theft therein, if the offender, (1) is armed with a dangerous weapon; or (2) after entering arms himself with a dangerous weapon; or (3) commits a battery upon any person while in such place, or in entering or leaving such place.

Whoever commits the crime of aggravated burglary shall be imprisoned at hard labor for not less than one nor more than thirty years."

[12] See *Johnson* v. *Louisiana, supra.*

Court held his jury need not be unanimous in order to convict. There are many variables on this theme but the appellant's logic if followed would yield a chaotic result.

The State submits that question number two presents no substantial federal inquiry because the Court has addressed these issues previously and has rejected them.

ASSIGNMENT NUMBER III

By this assignment the appellant contends that the Louisiana Supreme Court erred in failing to hold that the Fourteenth Amendment as announced in *Jackson* v. *Virginia*, 443 U.S. 307, 61 L.Ed. 2nd 560, 99 S.Ct. 2781 (1979) requires the prosecution in a circumstantial evidence case to exclude every reasonable theory of the defendant's innocence beyond a reasonable doubt.

The State submits that this contention should be rejected for two reasons: (1) Appellant did not properly raise the question and (2) the Due Process Clause does not require this standard of proof in a circumstantial evidence case.

Appellant did not contend in his motion for new trial that Due Process required the State to exclude every hypothesis of his innocence beyond a reasonable doubt.[13] Appellant did not assign it in his assignment of errors.[14] Appellant merely contested the evidentiary sufficiency of the State's proof in light of these two standards. While the Louisiana Supreme Court did address this issue[15] it

---

[13] See appellant's Jurisdictional Statement Appendix E. pp. 31a, 32a.

[14] See appellant's Jurisdictional Statement Appendix N pp. 55a, 56a.

[15] See that part of their opinion reproduced as Appendix "G"

was not called on to do so in the appeal. Hence the Court should not review this issue. [Rules of the Supreme Court of the United States; Rule 16.1(b)]

The State submits that the Due Process Clause of the Fourteenth Amendment does not require this standard of proof in a circumstantial evidence case. The Court in *Jackson* v. *Virginia, supra* specifically declined to require this standard of proof. In *Jackson* the Court said:

> "Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. That theory the Court has rejected in the past. *Holland* v. *United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150. We decline to adopt it today." (*Jackson* v. *Virginia* at pages 2792, 2793)

The *Jackson* case dealt with a question of specific intent to kill. The only eyewitness to the crime was the defendant. His version of the crime was apparently produced in the form of a self serving post Miranda statement to the police. The balance of the evidence against the defendant was entirely circumstantial. Thus, even though *Jackson* did not deal with a state statute defining the burden of proof in circumstantial evidence cases it dealt with a circumstantial evidence case as surely as the *Graham* case did. In our case, Lewis Graham provided the only eyewitness account of parts of the crime. He gave his version of the crime through his post Miranda statements to police and his trial testimony. The rest of the evidence against him was circumstantial. If *Jackson* v. *Virginia* did not require a more rigid standard of proof under its facts, neither did the Louisiana Supreme Court err in not requiring that standard on these facts.

The fact that the Louisiana statutory scheme defines the burden of proof in circumstantial evidence cases and

that the Louisiana Supreme Court in a prior case *State* v. *Austen*, 399 So.2d 158 (1981) combined the rules of proof i.e. beyond a reasonable doubt to the exclusion of every reasonable hypothesis of innocence, does not mean (1) that the Due Process Clause requires a dual standard or (2) that the Louisiana Supreme Court could not retreat from that analysis. *Jackson* v. *Virginia* said that due process acts as a lower limit on an appellate court's definition of evidentiary sufficiency. See *Tibbs* v. *Florida*, ___ U.S. ___, 72 L.Ed. 2nd 652, 102 S.Ct. ___.

In *Graham* the Louisiana Supreme Court reviewed the sufficiency of the evidence using both the test announced in *Jackson* and the test provided by *La. R. S. 15:438.*[16] This analysis satisfies the standard which the defendant now seeks. For this Court to rule that Due Process requires the State to exclude every reasonable hypothesis of the defendant's innocence beyond a reasonable doubt would allow the State legislatures to define the scope of due process.

When the evidence against Lewis Graham is viewed in the light most favorable to the prosecution a rational juror could rationally conclude beyond a reasonable doubt that he was guilty of murdering his wife. While due process does not require more the State submits this evidence also excluded every reasonable theory of his innocence.

Because the Court has previously rejected the position appellant now advances, there is no substantial federal question for review. The Louisiana Supreme Court has satisfied due process in its review of these facts. Assignment number three should be dismissed.

---

[16] See Appendix "H"

CONCLUSION

The State of Louisiana moves this Court to dismiss the appeal which Lewis Graham has lodged because it does not merit plenary review. The State prays that this Court affirm the judgment of the Louisiana Supreme Court which affirmed Mr. Graham's conviction and sentence.

Respectfully submitted,

STATE OF LOUISIANA

BY: Dale G. Cox, Jr.

DALE G. COX, JR.
Counsel on Appeal
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101

Paul J. Carmouche

PAUL J. CARMOUCHE
Trial Counsel
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101

CERTIFICATE

We hereby certify that we are members of the Bar of this Court and that appropriate copies of the above and foregoing motion to dismiss the appeal lodged by appellant have been served upon all parties required to be served herein all in accordance with the Supreme Court rules by depositing same in the United States Mail with First Class postage prepaid addressed as follows:

(1) Mr. Bobby D. Sutton
Counsel of Record
Burnett, Sutton, Walker and Callaway
(A Professional Law Corporation)
1400 Youree Drive
Shreveport, Louisiana 71101

(2) Mr. Glen Walker
Of Counsel
Burnett, Sutton, Walker and Callaway
(A Professional Law Corporation)
1400 Youree Drive
Shreveport, Louisiana 71101

(3) Ms. Barbara B. Rutledge
Assistant Attorney General
State of Louisiana
State Capitol
P.O. Box 44005
Baton Rouge, Louisiana 70804

(4) Hon. William J. Guste, Jr.
Attorney General
State of Louisiana
State Capitol
P.O. Box 44005
Baton Rouge, Louisiana 70804

Dale G. Cox, Jr.

DALE G. COX, JR.
Counsel on Appeal
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101

Paul J. Carmouche

PAUL J. CARMOUCHE
Trial Counsel
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101

TABLE OF CONTENTS FOR APPENDIX

APPENDIX "A"

CRIMINAL DOCKET
FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

Number 114,292

STATE OF LOUISIANA

v.

LEWIS T. GRAHAM

LADIES AND GENTLEMEN OF THE JURY:

Having heard the evidence and arguments of counsel, it now becomes my duty to instruct you on the law applicable to this case, after which you will be called upon to reach and render a verdict on the guilt or innocence of the accused.

I charge you, Ladies and Gentlemen, that you are the judges of the law and the facts. It belongs to you alone to determine the weight and credibility of the evidence. It is for you to decide what facts have, or have not, been proved. I am not permitted even to comment thereon. But, while you are also the judges of the law, it is your duty to accept and to apply the law as herein charged to you.

In determining the credibility of witnesses and the weight you will give to their testimony, you may take into consideration the probability or improbability of their statements, their opportunities for knowledge of the facts to which they testify, their demeanor on the stand, the interest or lack of interest they may have shown in the case, and every circumstance surrounding the giving of their testimony which may aid you in weighing their statements. If you believe that any witness in the case, either for the State or for the defense, has wilfully and deliberately testified falsely to any material fact for the pur-

pose of deceiving you, then I charge you that you are justified in disregarding the entire testimony of such witness as proving nothing, and as unworthy of belief. You have the right to accept as true, or reject as false, the testimony of any witness as proving nothing, and as unworthy of belief. You have the right to accept as true, or reject as false, the testimony of any witness, in whole or in part, accordingly as you are impressed with his veracity.

I instruct you further, Ladies and Gentlemen, that you are to disregard any remarks that may have been made by the attorneys in the case insofar as they are inconsistent with the evidence that has been introduced or my instructions pertaining to the law.

I charge you that the fact that an accused stands before you charged with a crime by an indictment found by a Grand Jury creates no presumption against him. The indictment is a mere accusation or charge against him; it is not evidence of the defendant's guilt and you must not be influenced by it in considering the case.

On the contrary, every person accused of crime is presumed to be innocent. He is not required to prove his innocence, but there is imposed upon the State the burden of proving his guilt, by proving every essential element of the crime charged. In other words, a person accused of crime is presumed by law to be innocent until each element of the crime, or lesser included offense, necessary to constitute his guilt, is proven beyond a reasonable doubt. The State, however, is not required to prove this with absolute certainty; it is sufficient if the State shall prove the defendant's guilt beyond a reasonable doubt.

A reasonable doubt must be actual and substantial, as distinguished from a vague apprehension, and must arise from the evidence or from a lack of evidence. It is a doubt founded on reason, and not a mere conjecture and idle supposition unrelated to the evidence. It is such a doubt as would influence the decision of a reasonable man to act, or not to act, in the important affairs of his daily life. In short, a reasonable doubt is

such a doubt that reasonable men may entertain after a careful consideration of all things proper to be considered in the matter at hand.

It is the duty of the jury, in considering the evidence and in applying to that evidence the law as given by the Court, to give the defendant the benefit of every reasonable doubt arising out of the evidence or want of evidence in the case. I charge you therefore, that, after you have carefully considered all of the evidence, the arguments of counsel, and the charge of the Court in this case, if there is in your mind any reasonable doubt that the State has proved every essential element of the crime charged or lesser included offense, it is your duty to give the accused the benefit of the doubt and acquit him. If, on the other hand, the State has proved beyond any reasonable doubt every essential element of the crime charged, it is your duty to convict the defendant.

There are two methods by which facts can be established. These are direct and circumstantial evidence. Direct evidence is evidence bearing directly, and without the aid of inference or deduction, on the question at issue or the fact to be proved. Circumstantial evidence is the evidence of certain facts, from which are to be inferred the existence of other material facts, bearing upon the question at issue or the facts to be proved. Circumstantial evidence is legal and competent. The jury may convict upon circumstantial as well as upon direct evidence, but of the former, great caution should be used. The rule as to circumstantial evidence is: Assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. In other words, if any rational conclusion other than the guilt of the accused is consistent with that proof, then it is insufficient to convict. This rule applies only when the conviction depends entirely upon circumstantial evidence, so that if there is any direct evidence tending to connect the defendant with the commission of the crime charged, the rule does not apply.

APPENDIX "B"

La. R. S. 15:470

"No juror, grand or petit, is competent to testify to his own or his fellows' misconduct, or to give evidence to explain, qualify or impeach any indictment or any verdict found by the body of which he is or was a member; but every juror, grand or petit, is a competent witness to rebut any attack upon the regularity of the conduct or of the findings of the body of which he is or was a member."

APPENDIX "C"

422 So.2d 123 ('82) (pp. 132,133, 134)

(11,12) The problems presented by an experiment conducted by jurors on their own defy precise, systematic analysis. A juror is expected to draw upon his general knowledge and experience in deciding the case, and he is encouraged to participate in full and robust debate and deliberations with his fellows in reaching a verdict. However, he should not consider facts relating to the case unless introduced at trial under constitutional and legal safeguards. *State* v. *Sinegal*, 393 So.2d 684 (1981). Accordingly, when a juror passes beyond the record evidence in reaching a decision, whether a new trial will be granted depends upon the magnitude of the juror's deviation from his proper role, the degree to which the accused was deprived of the benefits of the constitutional and statutory safeguards and the likelihood that the impropriety influenced the jury's verdict. All of these elements must be weighed in determining whether there is a reasonable possibility that the defendant's right to a fair trial has been prejudiced.

The jurors' experiment in the present case does not represent a radical departure from our expectations that a juror will employ his own ordinary experience in the deliberations. Any normal human being will experience his share of childhood scrapes, razor nicks, blood test pricks and various other episodes producing practical knowledge of blood coagulation. To say that a juror could not pass a fraction of an inch beyond the record to recall and employ this type of practical knowledge in his deliberations is to ignore centuries of history and the true function of the jury. Cf. *United States ex rel Owen* v. *McMann*, 435 F.2d 813 (2d Cir. 1970), cert. denied 402 U.S. 906, 91 S.Ct. 1373, 28 L.Ed.2d 646. Although the juror's experiment in this case cannot be classified as proper conduct, it was performed within the jury room and dealt with a subject well within the experience and practical knowledge of all jurors. As contrasted with other cases, it did not involve jurors conducting tests of matters beyond their normal ken or going outside the jury room to obtain esoteric knowledge of special information

pertaining directly to the case. See e.g. *State* v. *Sinegal*, *supra; Durr* v. *Cook*, *supra*. Consequently, the danger that the juror's common sense would be overcome by the experiment's instructive or dramatic effect was well tempered by an average juror's practical experience with blood coagulation.

The jurors' timing of blood clots on a pricked finger did not deprive the defendant of the benefits of constitutional and legal safeguards to the same extent as other tests described in reported decisions. The experiment here did not depend heavily on the jurors' powers of observation or on the reliability and credibility of a juror's report upon phenomena observed outside the jury room. Cf. *Durr* v. *Cook*, *supra*. Consequently, the loss of an opportunity to confront and cross-examine those who conducted the experiment was not as potentially prejudicial to the defendant. Furthermore, the rules of evidence would not necessarily have barred the introduction of the blood clot test evidence in this case. Demonstrative evidence offered for its circumstantial value may be admitted within a broad discretionary power of the trial court to weigh the probative value of the evidence against whatever prejudice, confusion, surprise and waste of time are entailed. McCormick § 212, p.527. Consequently, the practical benefits the defendant lost because he was not able to assert his constitutional and legal rights at trial with respect to the experimental evidence were not of crucial magnitude in this case.

The juror's experiment tends to corroborate the prosecution expert witness' opinion that human blood coagulates in three to five minutes. In our opinion, however, there is not a reasonable possibility that the juror's experiment contributed decisively to the guilty verdict. In a different context another type of experiment could prevent a jury from recognizing a reasonable doubt or a reasonable hypothesis of innocence presented by the evidence. In the present case, however, there is no reasonable hypothesis of innocence and the evidence clearly supports a finding of guilt beyond a reasonable doubt even without the state's theory involving blood coagulation time. Moreover, the experiment in this case, when viewed in the context of the

evidence presented at trial and the ordinary experience most persons have had with blood coagulation does not appear to be so persuasive or dramatic as to skew the judgment of the jury or cause it to disregard the evidence presented at trial.

During the trial, Mr. McDonnell testified that human blood coagulates within three to five minutes. Based on this and his opinion that some of the blood on the defendant's clothes had coagulated before it was spattered on defendant, this expert witness expressed the opinion that defendant could not have received the blood spatters in the manner in which the defendant described the events surrounding the murder.

However, Mr. McDonnell admitted he had not tested the spots on the defendant's clothes to make certain they were from pre-coagulated blood. Mrs. Bunker cast doubt on his theory when she testified that the spatters could have been caused by particles of the victim's flesh mixed with blood which coagulates more rapidly than pure blood. Dr. Petty in giving testimony in relation to the coagulation of defendant's blood stated that the coagulation time of human blood varies with the circumstances of case and the individual. On the other hand, there is even less blood coagulation evidence supporting the defendant's hypothesis of innocence. There was no affirmative evidence at trial whatsoever to the effect that the victim's blood could have coagulated with the rapidity necessary to fit within the defendant's account of the crime events.

When we weigh all of the evidence pointing toward defendant's guilt against the defense's unlikely hypothesis of innocence, including defendant's unusual story of how he got his wife's blood spattered on both the front and back of his underclothes, all of the evidence concerning blood coagulation time recedes in importance. Ultimately, the blood coagulation theory is not essential to the state's case. Furthermore, the juror experiment added virtually nothing to the theory. At most, it was cumulative to Mr. McDonnell's opinion about blood coagulation time. Since his opinion was not disputed at trial, the corroborative effect of the experiment was slight. We do

not think Dr. Petty's testimony disputed the McDonnell opinion. He said the coagulation times can vary, but he was not asked about the three to five minute period as an average or normal time. Mr. McDonnell said that coagulation time for human blood is three to five minutes, but he was not asked if this interval could vary under any circumstances. In short, there was at most only a possible area of conflict between the two experts which was not explored or drawn into focus. On top of this, the whole foundation of McDonnell's coagulation theory was called into question by Bunker's testimony that defendant's clothes did not have precoagulated spatters and McDonnell's admission that he couldn't be positive that they did. In essence, the jury experiment was cumulative to a part of a state expert's testimony which was not disputed at trial and which was not essential to a prosecution case that excluded every reasonable hypothesis of innocence and formed the basis for a rational finding of guilt beyond a reasonable doubt."

APPENDIX "D"

Article 1, Section 17 Louisiana Constitution of 1974

."Section 17. A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury."

APPENDIX "E"

La. C. Cr. P. Article 782

"A. Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.

B. Trial by jury may be knowingly and intelligently waived by the defendant except in capital cases."

APPENDIX "F"

La. R.S. 14:64

"A. Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

B. Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than five years and for not more than ninety-nine years, without benefit of parole, probation or suspension of sentence."

APPENDIX "G"

422 So.2d ('82) (pp 129-131)

1. Sufficiency of Evidence (Assignment No. Seven)

Defendant contends that the evidence is constitutionally insufficient to support his conviction because all of the evidence was circumstantial as to his identity as the killer and did not exclude every reasonable hypothesis of his innocence. We conclude that this assignment is without merit. The hypothesis of innocence advanced by the defendant is not a reasonable one.

(1-3) The Due Process Clause of the Fourteenth Amendment requires this court to review the evidence upon which a criminal conviction is based to determine whether it is minimally sufficient. A defendant has not been afforded due process, and his conviction cannot stand, unless, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Additionally, we are governed by our statutory rule as to circumstantial evidence: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. R.S. 15:438.

In previous opinions we have attempted to formulate a single precept incorporating both standards. See, e.g., *State* v. *Austin*, 399 So.2nd 158 (La. 1981). ("Therefore, when we review a conviction based upon circumstantial evidence we must determine that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded beyond a reasonable doubt that every reasonable hypothesis of innocence had been excluded." Id. p. 160) Upon further reflection, however, a merger does not appear to promote clarity but could lead to a distortion of the standards. A combination of the rules may incorrectly imply that, when all of the evidence of the defendant's guilt is circumstantial, due process requires more than evidence which would satisfy any rational juror of proof of guilt beyond a reasonable doubt. On

the other hand, an in-tandem articulation may seem improperly to diminish the requirement of the circumstantial evidence rule by implying that, in a close case, this court will defer to the jury's finding rather than follow its own determination of whether there is a reasonable hypothesis of innocence. Although in many instances separate and dual applications of the rules will yield the same result, out of an abundance of caution we will proceed to apply each standard separately, as it was given to us by the framers.

(4) The characterization of evidence as "direct" or "circumstantial" points to the kind of inference which is sought to be drawn from the evidence to the truth of the proposition for which it is offered. If the inference sought is merely that certain facts are true because a witness reported his observation and the assumption that witnesses are worthy of belief, the evidence is direct. When, however, the evidence is offered also for some further proposition based upon some inference other than merely the inference from assertion to the truth of the fact asserted, then the evidence is circumstantial evidence of this further fact-to-be-inferred. McCormick, § 185 p. 435. In the present case, although direct evidence was introduced to prove that the victim was murdered in her bed with a sledgehammer while the defendant was present, it qualifies only as circumstantial evidence of the crucial fact-to-be-inferred, i.e., that the defendant was the killer.

One hypothesis of innocence is suggested by defendant's arguments and testimony: Two or more intruders entered the Graham house on the night in question without awakening the Grahams or their three children, escaping the attention of the Graham's dog, and leaving only questionable signs of forcible entry. They picked up a sledgehammer and a knife in the house and preceeded to the main bedroom where the Grahams were sleeping. One or more of the intruders seized the defendant while another beat his wife's head with a sledgehammer. At this time, the front of the defendant's tee-shirt and shorts were spattered with his wife's blood. During a brief struggle, the defendant received a small one-stitch wound from the knife,

and was rendered unconscious when he was thrown against a wall. The intruders decided not to molest him anymore but continued to savagely beat his wife's head. Because the defendant came to rest face down he received blood spatters on the back of his tee-shirt and shorts in addition to that on the front. During or after the sledgehammer murder one or more of the intruders took a can of coins which defendant said contained $150 in dimes, but later the can was discarded in front of the house. They also scattered some bottles of liquor across the den floor and tampered with a set of binoculars. The murderers overlooked or were not interested in several items of value such as Mrs. Graham's diamond ring and an antique pistol. They departed without being seen by anyone, even the defendant who was unable to describe them, without disturbing or awakening any of the three children, and again without being detected by the family dog.

We do not think this is a reasonable interpretation of the situation, assuming every fact to be proved that the evidence tends to prove. The odds are heavily against the coincidence of the series of unlikely events upon which the hypothesis depends. The possibility that the murder occurred in this way is reduced further by the facts inconsistent with defendant's theory which the evidence also tends to prove. In comparison with the prosecution's hypothesis of defendant's guilt, which is consistent overall with the evidence, the defendant's circumstantial theory of innocence is remote.

Severally, the events of the defendant's hypothesis are each unlikely: A forcible yet silent, almost traceless entry by two unidentified and undescribed intruders; a heinous sledgehammer murder of a woman in her sleep by selective killers who had little malice toward her husband and none toward her children; a fortuitous manipulation of defendant's torso during the slaying that gave him the bloody coating of a murderer; a highly selective burglary by criminals who preferred dimes to other more precious valuables; a trackless disappearance of villains seen only by defendant, who silently, efficiently committed their bizarre crime with implements they discovered at the house and left no clues to their identities behind. The odds

against all of these events taking place in one criminal transaction are extremely high.

The hypothesis of defendant's innocence conflicts with several of the facts which the evidence tends to show. According to the state's expert witness, the cast off blood stains on defendant's shoulders were not consistent with his asserted facedown reclining position but were consistent with his guilt. The same expert's testimony tends to prove that there was coagulated blood on the front of defendant's underclothes which could not have been obtained consistently with defendant's story but which was consistent with his guilt.

There were many other details which were more fully consistent with the prosecution's theory than with a hypothesis of innocence. The blood spatters on defendant's shorts were denser than those on his tee-shirt, indicating a greater likelihood that he was standing when the spatters occurred. The blood spatters on both front and back of defendant's clothes were totally consistent with his role as the murderer. According to the state's experts no one's fingerprints but the defendant's were found on the knife. Although defendant claims he was cut with the knife before being thrown face down there was no blood at the place he said he landed. There were transfer patterns on defendant's tee-shirt consistent with the wiping of blood from an instrument such as a knife, although it could not be said conclusively that it was caused by the knife in the instant case.

(5) Consequently, we conclude that, assuming every fact that the evidence tends to prove, the evidence excludes every reasonable hypothesis of innocence. For all of the reasons expressed, we further conclude that defendant was not denied due process of law and that this conviction is clearly based upon evidence from which, when viewed in the light most favorable to the prosecution, a rational juror could find that the essential elements of defendant's crime had been proved beyond a reasonable doubt. Thus, the evidence is both constitutionally and statutorily sufficient to support the defendant's conviction.

APPENDIX "H"

La. R.S. 15:438

"The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."